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# State v. Burdett Respondent's Brief Dckt. 42440

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

STATE OF IDAHO,

Plaintiff-Respondent,

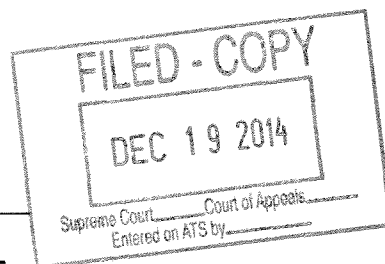
vs.

ADAM JAMES BURDETT,

Defendant-Appellant.

No. 42440

Kootenai Co. Case No.  
CR-MD-2013-14561



BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF KOOTENAI

HONORABLE PENNY E. FRIEDLANDER, Magistrate Judge  
HONORABLE LANSING L. HAYNES, District Judge

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## TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE .....	1
Nature of the Case .....	1
Statement of Facts and Course of Proceedings .....	1
ISSUE .....	4
ARGUMENT .....	5
Burdett Failed To Present Evidence That Officer Neal Seized Him When Officer Neal Made Initial Contact.....	5
A.    Introduction.....	5
B.    Standard Of Review .....	5
C.    Burdett Failed To Show Officer Neal Seized Him When Officer Neal Made Initial Contact .....	6
D.    Even If Officer Neal's Initial Contact Constituted A Seizure Of Burdett, Officer Neal Had Reasonable Articulable Suspicion To Detain Burdett For An Investigation .....	10
CONCLUSION .....	12
CERTIFICATE OF MAILING.....	12

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Florida v. Bostick</u> , 501 U.S. 429 (1991) .....	7
<u>Florida v. Royer</u> , 460 U.S. 491 (1983) .....	7
<u>Losser v. Bradstreet</u> , 145 Idaho 670, 183 P.3d 758 (2008) .....	5, 6
<u>Nicholls v. Blaser</u> , 102 Idaho 559, 633 P.2d 1137 (1981)) .....	6
<u>State v. DeWitt</u> , 145 Idaho 709, 184 P.3d 215 (Ct. App. 2008) .....	5
<u>State v. Fry</u> , 122 Idaho 100, 831 P.2d 942 (Ct. App. 1991) .....	7, 8
<u>State v. Jordan</u> , 122 Idaho 771, 839 P.2d 38 (Ct. App. 1992) .....	7
<u>State v. Liechty</u> , 152 Idaho 163, 267 P.3d 1278 (Ct. App. 2011) .....	7, 8, 9
<u>State v. Linenberger</u> , 151 Idaho 680, 263 P.3d 145 (Ct. App. 2011) .....	6, 8, 10
<u>State v. Martinez</u> , 136 Idaho 436, 34 P.3d 1119 (Ct. App. 2001) .....	9
<u>State v. Nickel</u> , 134 Idaho 610, 7 P.3d 219 (2000) .....	9
<u>State v. Page</u> , 140 Idaho 841, 103 P.3d 454 (2004) .....	6, 8
<u>State v. Reese</u> , 132 Idaho 652, 978 P.2d 212 (1999) .....	6, 8
<u>State v. Schmidt</u> , 137 Idaho 301, 47 P.3d 1271 (Ct. App. 2002) .....	8
<u>State v. Sheldon</u> , 139 Idaho 980, 88 P.3d 1220 (Ct. App. 2003) .....	10
<u>State v. Willoughby</u> , 147 Idaho 482, 211 P.3d 91 (2009) .....	6, 8
<u>Terry v. Ohio</u> , 392 U.S. 1 (1968) .....	7, 10
<u>United States v. Mendenhall</u> , 446 U.S. 544 (1980) .....	8
 <u>STATUTES</u>	
I.C. § 49-1401 .....	11

## STATEMENT OF THE CASE

### Nature of the Case

Adam James Burdett appeals from the district court's decision affirming the magistrate's decision denying his motion to suppress.

### Statement of Facts and Course of Proceedings

Patricia Frank was at home sitting on her porch reading the paper when she saw a Subaru Forester driven by Burdett ram a parked SUV. (10/18/13 Tr., p. 3, L. 4 – p. 6, L. 19.) Mrs. Frank then saw Burdett and a female passenger exit the Subaru Forester and walk to the public beach. (10/18/13 Tr., p. 6, L. 8 – p. 7, L. 2.) Mrs. Frank called the police. (10/18/13 Tr., p. 7, Ls. 6-11.) Mrs. Frank then walked to the beach and saw Burdett and the female get into the lake. (10/18/13 Tr., p. 7, Ls. 20 – p. 8, L. 1.)

Officer Neal of the Coeur d' Alene police department responded to the call. (10/18/13 Tr., p. 11, Ls. 3-25.) When Officer Neal arrived on the scene he could see the Subaru Forester reported by Mrs. Frank, but did not notice any major damage. (10/18/13 Tr., p. 12, Ls. 4 – 23.) Officer Neal did not closely inspect the vehicle when he first arrived. (Id.) Officer Neal ran the license plates of the Subaru Forester and the Subaru Forester was registered to Burdett. (10/18/13 Tr., p. 13, L. 14 – p. 14, L. 17.) Officer Neal pulled a photograph of Burdett. (10/18/13 Tr., p. 14, Ls. 20-24.) Officer Neal then walked down to the beach and spoke with Mrs. Frank who pointed out Burdett and the female. (10/18/13 Tr., p. 7, Ls. 20 – p. 9, L. 1, p. 14, L. 20 – p. 15, L. 5.) At the time, Burdett was standing chest deep in the water. (10/18/13 Tr., p. 15, Ls. 13 – 23.)

Officer Neal walked down to the water and asked Burdett if he could speak with him. (10/18/13 Tr., p. 15, L. 16 – p. 16, L. 10.) Burdett verbally identified himself, but he did not have identification on him because he was in swim shorts in the water. (10/18/13 Tr., p. 16, L. 25 – p. 17, L. 10.) During their conversation, Burdett admitted the Subaru Forrester was his car, but he denied being in an accident. (10/18/13, Tr., p. 17, Ls. 11-19.) Initially Burdett denied driving the Subaru Forrester, but subsequently changed his story and admitted to driving the car. (10/18/13 Tr., p. 17, Ls. 16 – 22.) When Burdett got out of the water Officer Neal immediately noticed a strong odor of an alcoholic beverage, saw that Burdett's eyes were glassy and bloodshot and heard that his speech was slurred. (10/18/13 Tr., p. 18, L. 22 – p. 19, L. 5.) Burdett admitted to drinking a beer. (10/18/13 Tr., p. 20, Ls. 8-10.) Burdett failed the Field Sobriety tests and blew .344/.341. (R., pp. 13-14.)

Burdett was charged with Driving Under the Influence – Excessive and Driving Without Privileges. (R., pp. 52-53.) Burdett filed a Motion to Suppress on the grounds “the warrantless stop and arrest by the officer was unlawful and without legal justification.” (R., pp. 46-47.) Specifically Burdett challenged whether Officer Neal had reasonable articulable suspicion to initially detain Burdett while Burdett was still in the water. (10/18/13 Tr., p. 1, L. 25 – p. 2, L. 10.) Mrs. Frank and Officer Neal testified at the suppression hearing. (R., pp. 64 – 66.)

The magistrate court issued its finding of facts and conclusions of law on the record. (10/21/13 Tr., p. 30, L. 3 – p. 35, L. 1.) The magistrate concluded

that when Officer Neal made initial contact he did not have reasonable articulable suspicion that Burdett had engaged in criminal activity, but the magistrate found the initial contact to be consensual and denied the motion to suppress. (10/21/13 Tr., p. 33, L. 2 – p. 35, L. 1.) Burdett entered a guilty plea, but reserved the right to appeal the suppression decision. (10/21/13 Tr., p. 36, L. 1 – p. 38, L. 21.)

The district court affirmed the magistrate's decision denying Burdett's motion to suppress. (R., pp. 116 – 119.) The district court found that:

[T]he facts of the instant case lead this Court to conclude that Officer Neal's asking if Burdett would speak with him did not convey a message to Burdett or any reasonable person that compliance was required. Burdett was free to act as he did, but was equally free to decline the request and continue to wade/swim. Thus, Burdett was not the subject of a seizure by law enforcement. The Magistrate was correct in her legal conclusion and denial of Burdett's Motion to Suppress.

(R., pp. 118-119.) Burdett timely appealed the district court's order denying his motion to suppress. (R., pp. 121-124.)

## ISSUE

Burdett states the issue on appeal as:

I. Whether an officer seizes a swimming defendant by standing on the shore and asking him to get out of the lake to speak with him.

(Appellant's brief, p. 4)

The state rephrases the issue as:

Has Burdett failed to establish the magistrate court and district court erred when they determined Burdett was not seized by Officer Neal when Officer Neal asked Burdett questions while Burdett was standing in the lake?



## ARGUMENT

### Burdett Failed To Present Evidence That Officer Neal Seized Him When Officer Neal Made Initial Contact

#### A. Introduction

Mrs. Frank saw Burdett drive his Subaru Forester into a parked SUV. (10/18/13 Tr., p. 3, L. 4 – p. 6, L. 19.) When Officer Neal responded to the scene, Mrs. Frank pointed out Burdett. (10/18/13 Tr., p. 7, Ls. 20 – p. 9, L. 1, p. 14, L. 20 – p. 15, L. 5.) Officer Neal then asked Burdett some questions while Burdett was standing chest deep in the water. (10/18/13 Tr., p. 15, L. 13 – p. 16, L. 190.)

On appeal, Burdett argues these questions constituted a seizure because Burdett was in the water. (Appellant's brief, pp. 7-8.) Both the magistrate court and the district court rejected this argument. (10/21/13 Tr., p. 33, L. 2 – p. 35, L. 1; R., pp. 118-119.) It was Burdett's burden to show that this initial contact constituted a seizure. Burdett failed to meet his burden. Officer Neal's initial questions to Burdett did not constitute a seizure.

Even if Officer Neal's initial questions constituted a seizure, Officer Neal had reasonable articulable suspicion to detain Burdett because of Mrs. Frank's eye witness report.

#### B. Standard Of Review

On review of a decision rendered by a district court in its intermediate appellate capacity, the reviewing court "directly review[s] the district court's decision." State v. DeWitt, 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct. App. 2008) (citing Losser v. Bradstreet, 145 Idaho 670, 183 P.3d 758 (2008)). The

appellate court “examine[s] the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings.” Id. “If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, [the appellate court] affirm[s] the district court's decision as a matter of procedure.” Id. (citing Losser, 145 Idaho 670, 183 P.3d 758; Nicholls v. Blaser, 102 Idaho 559, 633 P.2d 1137 (1981)).

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, the appellate court accepts the trial court's findings of fact that are supported by substantial evidence, but freely reviews the application of constitutional principles to those facts. State v. Linenberger, 151 Idaho 680, 683, 263 P.3d 145, 148 (Ct. App. 2011).

C. Burdett Failed To Show Officer Neal Seized Him When Officer Neal Made Initial Contact

Burdett argues that district court erred when it found that Officer Neal's initial contact with Burdett, while Burdett was standing in the lake, did not constitute a seizure of Burdett. (Appellant's brief, pp. 5-8.) Burdett's argument fails because there was no evidence that Officer Neal seized Burdett when Officer Neal made initial contact. When a defendant seeks to suppress evidence that is alleged to have been obtained as a result of an illegal seizure, the defendant bears the burden of proving that a seizure occurred. State v. Willoughby, 147 Idaho 482, 486, 211 P.3d 91, 95 (2009) (citing State v. Page, 140 Idaho 841, 843, 103 P.3d 454, 456 (2004); State v. Reese, 132 Idaho 652,

654, 978 P.2d 212, 214 (1999)). “[N]ot all encounters between the police and citizens involve the seizure of a person.” State v. Liechty, 152 Idaho 163, 167, 267 P.3d 1278, 1282 (Ct. App. 2011) (citing Terry v. Ohio, 392 U.S. 1, 19 n. 16 (1968); State v. Jordan, 122 Idaho 771, 772, 839 P.2d 38, 39 (Ct. App. 1992)). “Only when an officer, by means of physical force or show of authority, restrains the liberty of a citizen may a court conclude that a seizure has occurred.” Id. (citing State v. Fry, 122 Idaho 100, 102, 831 P.2d 942, 944 (Ct. App. 1991)).

A seizure does not occur simply because a police officer approaches an individual in a public place or by putting forth questions if the individual is willing to listen. Id. (citing Florida v. Bostick, 501 U.S. 429, 434–35 (1991); Florida v. Royer, 460 U.S. 491, 497 (1983)). “Unless and until there is a detention, there is no seizure within the meaning of the Fourth Amendment and no constitutional rights have been infringed.” Id. (citing Royer, 460 U.S. at 498). “Even when officers have no basis for suspecting a particular individual, they may generally ask the individual questions and ask to examine identification.” Id. (citing Fry, 122 Idaho at 102, 831 P.2d at 944). “So long as police do not convey a message that compliance with their requests is required, the encounter is deemed consensual and no reasonable suspicion is required.” Id. (citing Fry, 122 Idaho at 102, 831 P.2d at 944).

“Accounting for all of the surrounding circumstances, the critical inquiry when determining whether a seizure has occurred is whether a reasonable person would have felt free to disregard the police, decline the officer's request,

or otherwise terminate the encounter.” Linenberger, 151 Idaho at 684, 263 P.3d at 149 (citing Page, 140 Idaho at 843-44, 103 P.3d at 456-57).

Here, accounting for all the circumstances, no seizure occurred when Officer Neal approached the water and spoke to Burdett, who was standing in the water. Some examples of circumstances that might indicate seizure would be the “threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.” Liechty, 152 Idaho at 168, 267 P.3d at 1283 (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)). Other circumstances that can indicate seizure is whether the officer used overhead emergency lights or took action to block a vehicle's exit. Id. (citing Willoughby, 147 Idaho at 487-88, 211 P.3d at 96-97; State v. Schmidt, 137 Idaho 301, 302-303, 47 P.3d 1271, 1272-1273 (Ct. App. 2002); Fry, 122 Idaho at 103, 831 P.2d at 945).

In Reese, the Idaho Supreme Court found there was no seizure when there was:

[N]o direct contact, touching, or speech between the officer and Mr. Reese. There was no physical assertion of authority. There were no lights and sirens. There was no banging on the door. There was no blocking of the house entrances. There was no forceful assertion of authority. There was no threat to come in after Mr. Reese if he refused to come out. There was no evidence that the officer talked to the woman in a menacing manner.

Reese, 132 Idaho at 653-654, 978 P.2d at 213-214. Similarly there was no evidence that Officer Neal physically asserted his authority when he initially asked Burdett questions. On appeal, Burdett argues that Burdett could not get

away from Officer Neal because Burdett was in the water. (Appellant's brief, pp. 7-8) This argument is not supported by the record. Burdett was standing in the water when he spoke with Officer Neal. (10/18/13 Tr., p. 15, Ls. 13 – 23.) Burdett presented no evidence that Burdett could not simply wade or swim away. There was no evidence that Officer Neal blocked Burdett's movement. There was no evidence of lights or sirens. There was no threat by Officer Neal to come after Burdett if he did not come out of the water. There was no evidence that Officer Neal talked to Burdett in an menacing manner. Accounting for all of the circumstances, there was no evidence that a reasonable person would not have felt free to disregard the Officer Neal's questions or otherwise terminate the encounter.

Even if Burdett was somehow prevented from leaving due to the presence of the lake, it still would not constitute a seizure. "[T]he Fourth Amendment is not implicated where factors independent of police conduct prevent an individual from departing." Liechty, 152 Idaho at 168, 267 P.3d at 1283 (citing State v. Nickel, 134 Idaho 610, 613, 7 P.3d 219, 222 (2000) (no seizure when police took possession of defendant's expired temporary permit and the defendant was discouraged from driving away because of a dead-end road and muddy conditions); State v. Martinez, 136 Idaho 436, 441, 34 P.3d 1119, 1124 (Ct. App. 2001) (no seizure when defendant's movement was restricted by the inoperability of his car and he was hesitant to walk away leaving his disabled car with all his luggage)). Any restrictions on Burdett's movements due to the presence of the

lake and water are restrictions independent of police conduct. Burdett failed to establish he was seized when Officer Neal made initial contact.

D. Even If Officer Neal's Initial Contact Constituted A Seizure Of Burdett, Officer Neal Had Reasonable Articulate Suspicion To Detain Burdett For An Investigation

Patricia Frank saw Burdett ram a parked SUV with his Subaru Forester. (10/18/13 Tr., p. 3, L. 4 – p. 6, L. 19.) Mrs. Frank pointed out Burdett to Officer Neal. (10/18/13 Tr., p. 7, Ls. 20 – p. 9, L. 1, p. 14, L. 20 – p. 15, L. 5.) After the suppression hearing, the magistrate focused on the lack of damage to the Subaru Forester when it concluded that Officer Neal did not have reasonable articulable suspicion to detain Burdett upon their initial encounter. (10/21/13 Tr., p. 31, L. 25 – p. 32, L. 11, p. 32, Ls. 17-21, p. 33, Ls. 2-6, p. 34, L. 15 – p. 35, L. 1.) The magistrate erred because Officer Neal had reasonable articulable suspicion to investigate Burdett even though there was no apparent damage the vehicles.

The reasonableness of a seizure is a question of law over which the appellate court exercises free review. Linenberger, 151 Idaho at 683, 263 P.3d at 148. Reasonable suspicion must be based on specific articulable facts and the inferences that can be drawn from those facts. Id. at 684, 263 P. 3d at 149 (citing Terry, 392 U.S. at 21; State v. Sheldon, 139 Idaho 980, 983, 88 P.3d 1220, 1223 (Ct. App. 2003)). “Reasonable suspicion may be supplied by an informant’s tip or a citizen’s report of suspect activity.” Id. at 685, 263 P. 3d at 150. “Where the information comes from a known citizen informant rather than an anonymous tipster, the citizen's disclosure of his or her identity, which carries

the risk of accountability if the allegations turn out to be fabricated, is generally deemed adequate to show veracity and reliability.” Id. (citations omitted).

Here Mrs. Frank was a citizen eye witness who saw Burdett ram his car into a parked SUV. (10/18/13 Tr., p. 3, L. 4 – p. 7, L. 2.) Mrs. Frank called the police. (10/18/13 Tr., p. 7, Ls. 6-11.) Mrs. Frank identified Burdett. (10/18/13 Tr., p. 7, Ls. 20 – p. 9, L. 1, p. 14, L. 20 – p. 15, L. 5.) Officer Neal had reasonable articulable suspicion that Burdett committed any number of driving offenses,<sup>1</sup> including reckless driving (I.C. § 49-1401(1)) and inattentive driving (I.C. § 49-1401(3)) neither of which require physical damage to the parked car. While there is no evidence that Officer Neal seized Burdett upon their initial encounter, Mrs. Frank’s citizen eyewitness report and identification of Burdett as the driver was sufficient to give Officer Neal reasonable articulable suspicion to temporarily seize Burdett in order to conduct an investigation.


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<sup>1</sup> Burdett was charged with Driving Without Privileges and prior to his contact with Burdett, Officer Neal ran the license plates of Burdett’s car. (10/18/13 Tr., p. 13, L. 14 – p. 14, L. 17; R., pp. 52-53.) Presumably Officer Neal knew Burdett’s driving privileges were suspended prior to his contact with Burdett. However, this evidence was not presented at the suppression hearing.

CONCLUSION

The state respectfully requests this Court affirm the district court and magistrate's decision denying Burdett's Motion to Suppress


DATED this 19th day of December 2014.

  
\_\_\_\_\_  
TED S. TOLLEFSON  
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of December 2014, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

JAY LOGSDON  
Deputy Public Defendant  
400 Northwest Blvd.  
P.O. Box 9000  
Coeur d' Alene, Idaho 83816

  
\_\_\_\_\_  
TED S. TOLLEFSON  
Deputy Attorney General

/pm